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25 *appears on the signature page per Local Rule*
26 *3-4(a)(1)*

27 **UNITED STATES DISTRICT COURT**
28 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

29 **SAN JOSE DIVISION**

30 APPLE INC., CISCO SYSTEMS, INC.,
31 GOOGLE LLC, INTEL CORPORATION,
32 EDWARDS LIFESCIENCES
33 CORPORATION, and EDWARDS
34 LIFESCIENCES LLC,

35 Plaintiffs,

36 v.

37 ANDREI IANCU, in his official capacity as
38 Under Secretary of Commerce for Intellectual
39 Property and Director, United States Patent and
40 Trademark Office,

41 Defendant.

42 Case No. 20-cv-6128-EJD

43 **PLAINTIFFS' RESPONSE TO**
44 **DEFENDANT'S NOTICE OF**
45 **SUPPLEMENTAL AUTHORITY**

46 Date: Under Submission

47 Judge: Hon. Edward J. Davila

1 The Supreme Court’s recent decision in *TransUnion LLC v. Ramirez*, No. 20-297 (June 25,
 2 2021), does not aid the Director. To the extent that decision is relevant, it favors Plaintiffs.

3 *TransUnion* addressed the question of whether the defendant’s alleged violation of a federal
 4 statutory right owed to the plaintiffs satisfied the injury-in-fact requirement. Reiterating its prior
 5 statement in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), as revised (May 24, 2016), the Court
 6 “rejected the proposition that ‘a plaintiff automatically satisfies the injury-in-fact requirement
 7 whenever a statute grants a person a statutory right and purports to authorize that person to sue to
 8 vindicate that right.’” Slip op. at 10 (quoting *Spokeo*, 136 S. Ct. at 1549). Rather, the Court wrote:
 9 “Only those plaintiffs who have been concretely harmed by a defendant’s statutory violation” have
 10 standing to sue. *Id.* at 11. Accordingly, the Court also reiterated that “bare procedural violations,
 11 divorced from any concrete harm … do[] not suffice for Article III standing.” *Id.* (quoting *Spokeo*,
 12 136 S. Ct. at 1549). *TransUnion*’s articulation of controlling principles for evaluating injury in fact
 13 thus broke no ground and has no material effect on this case because, as Plaintiffs have explained,
 14 they do not rely on an allegation of bare statutory violation but rather have alleged concrete and
 15 particularized injuries. *See* Compl. ¶¶ 52-60; Dkt. 92 at 7-9 (“MTD Opp.”).

16 In fact, *TransUnion*’s application of these principles to the case before it confirms that
 17 Plaintiffs here have met the injury-in-fact requirement. Plaintiffs challenge the *NHK-Fintiv* rule,
 18 which has been and likely will continue to be applied to foreclose Plaintiffs’ IPR petitions. As
 19 alleged in the amended complaint and explained in their opposition to the motion to dismiss,
 20 Plaintiffs contend that the *NHK-Fintiv* rule creates “a substantial risk” that their “IPR petitions will be
 21 denied” and that Plaintiffs “will thereby be deprived of IPR’s benefits.” MTD Opp. 7; *see also*
 22 Compl. ¶¶ 52-60. For standing purposes, then, Plaintiffs are more akin to the “Maine citizen[]”
 23 whose “land is polluted by a nearby factory,” not the “plaintiff in Hawaii.” *TransUnion*, slip op. at
 24 11. And the Court’s suggestion that courts “assess whether the alleged injury to the plaintiff has a
 25 ‘close relationship’ to a harm ‘traditionally’ recognized as providing a basis for a lawsuit,” *id.* at 9
 26 (quoting *Spokeo*, 136 S. Ct. at 1549), is satisfied here because, as Plaintiffs have explained, it is well-
 27 established that the denial of a chance to obtain a benefit is an injury in fact, *see* MTD Opp. 8.
 28 *TransUnion* did not suggest otherwise.

1 Dated: June 28, 2021

Respectfully submitted,

2 By: /s/ Mark D. Selwyn

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ATTORNEY ATTESTATION

I, Mark D. Selwyn, am the ECF User whose ID and password are being used to file this document. In compliance with N.D. Cal. Civil L.R. 5-1(i)(3), I hereby attest that concurrence in the filing of the document has been obtained from each of the other signatories.

By: /s/ Mark D. Selwyn
Mark D. Selwyn

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2021, I electronically filed the above document with the Clerk of the Court using CM/ECF which will send electronic notification of such filing to all registered counsel.

By: /s/ Mark D. Selwyn
Mark D. Selwyn